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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1761

DISTRIGAS CORPORATION, DISTRIGAS OF NEW YORK CORPORATION and DISTRIGAS OF MASSACHUSETTS CORPORATION,

Petitioners,

against

FEDERAL POWER COMMISSION,

Respondent,

PACIFIC LIGHTING SERVICE COMPANY, *et al.*,

Intervenors.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MEMORANDUM FOR INTERVENOR PUBLIC SERVICE ELECTRIC AND GAS COMPANY IN SUPPORT

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1. Petitioners seek review of the Court of Appeal's Decision (Pet. App. A, pp. 1a-19a) affirming the Decisions of the Federal Power Commission issued May 25, 1973 (Pet. App. B, pp. 20a-27a) and its Order Denying Rehearing issued June 20, 1973 (Pet. App. C, pp. 28a-63a). Public Service Electric and Gas Company (here-

inafter "Public Service") supports the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

2. Public Service is a corporation organized under the laws of the State of New Jersey and has its principal office at 80 Park Place, Newark, New Jersey. It is a public utility operating company engaged among other things in the purchase, manufacture and distribution of gas. It purchases natural gas from three interstate transmission pipeline companies and serves gas to over 1,290,000 customers in an area having a population in excess of 4,900,000 persons and which extends from the Hudson River opposite New York City to the Delaware River at Trenton and thence to Camden, New Jersey.

3. On May 24, 1972, Public Service and Algonquin Gas Transmission Company entered into a contract to purchase Liquefied Natural Gas (LNG) from Societe Nationale Sonatrach (Sonatrach), an Algerian national company. The volumes to be purchased amount to 1,200 billion thermies of LNG over a period of approximately 22 years. Depending upon the BTU content, this amounts to approximately 4,760,000,000 Mcf.

Public Service plans to use the terminal facilities of Distrigas in order to receive its share of Algerian LNG. In addition, Public Service has arranged for the purchase of 5,000,000,000 cubic feet a year of LNG from Distrigas for a period of 20 years commencing in the winter of 1975-1976.

4. As part of the agreement with Distrigas, Public Service has agreed to make a first mortgage loan to Distrigas amounting to $60,000,000 to be used for the construction of the Staten Island facilities. From the period of January 29, 1973, to date, Public Service has loaned

$56,100,000 to Distrigas. In making this large investment Public Service *relied* on the Federal Power Commission's Orders and Opinions Nos. 613 and 613-A, dated March 9, 1972, and June 7, 1972, in Docket Nos. CP70-196, et al. These Orders were *final* and *non-appealable* at the time Public Service commenced making the mortgage loan, and Public Service *relied* on the fact that these Orders were final and that authorization for the construction of the facilities had been granted by the Federal Power Commission. In fact, all the necessary permits and authorizations had been granted to Distrigas. This was one of the compelling factors which induced Public Service to decide on using the Distrigas facilities rather than constructing its own facilities in New Jersey for the importation of LNG.

5. The Writ should be granted because the question of whether the conditioning authority of Section 3 of the Natural Gas Act (15 U.S.C. 717) can be used to impose Section 7 certificate jurisdiction over intrastate sales and operations over which the Federal Power Commission has been expressly denied jurisdiction by Section 1(b) of the Act is presented for the first time. Collateral to that issue is the question of whether the authority so imposed may be applied retroactively upon operations which have already commenced upon the understanding that they were not subject to Commission jurisdiction. Instead of overruling *Border Pipe Line Company* v. *F.P.C.*, 84 U. S. App. D. C. 142, 171 F. 2d 149 (1948), or following the reasoning the Commission used to support its Orders of May 25, 1973, and June 20, 1973, which distinguished the *Border* decision on the basis that it involved the exporting of gas, the Court below held that the Commission could condition import authorization under Section 3 so as to supplant state regulatory authority over intrastate facilities and intrastate sales of LNG, if the Commission

found that comprehensive federal regulation was necessary and appropriate to the public interests. In so doing, the Court was apparently oblivious to Section 1(b).

The Court below also rejected Petitioners' argument that *United States* v. *Seatrain Lines, Inc.*, 329 U. S. 424 (1947) sets a precedent as to the finality of agency orders which should be followed in this case. Section 3 does not specifically permit the revocation of an authorization retroactively, nor can such a power be inferred. A departure from *Seatrain* in this case constitutes a deprivation of property, without due process of law in contravention of the Fifth Amendment.

The Court below at oral argument mentioned as a possible solution a "grandfather-like" clause for the facilities in view of the affirmative action of the parties in reliance upon the decision by the Commission. This possible solution, which was acceptable to Petitioners and to Public Service, was not considered in the opinion of the Court of Appeals. This possible solution merits consideration from an equitable standpoint in view of the positive and irrevocable actions which Public Service has taken and may result in irreparable harm in the event on remand the Commission should deny certification.

It is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

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Dated: June 24, 1974